

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1181

September Term, 2015

FILED ON: JANUARY 15, 2016

UNF WEST, INC.,

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 14-1224

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petition for review be **DENIED** and the cross-application for enforcement be **GRANTED**.

UNF West, Inc. challenges the Board's decision that the company violated the National Labor Relations Act when two of its managers threatened employees in connection with their union activities. The Board filed a cross-application for enforcement of its order. The Board found that manager Mike Cusey summoned employee Edgar Acosta over the warehouse intercom to his office, where he questioned Edgar about his involvement in a union organizing effort. Edgar hypothesized that Cusey knew to question him because another supervisor, Jeff Popovich, may have eavesdropped on Edgar's conversation about the union with other employees at a breakroom table the day before. The Board also found that manager Javier Oliver warned employee Sergio Acosta on several occasions to refrain from union activities. These findings followed a hearing before an administrative law judge (ALJ) who expressly credited

Edgar's and Sergio's testimony primarily because of their demeanor as compared to that of the company's witnesses. Seeing no basis to overturn these findings, we deny UNF West's petition for review and grant the Board's cross-application for enforcement.

As a preliminary matter, UNF West attempts to make a number of arguments on appeal by doing no more than referring to arguments it previously made to the Board. These arguments are not properly before us. *See, e.g., Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013) (refusing to consider arguments made by reference to those raised in the district court); *Gerlich v. DOJ*, 711 F.3d 161, 173 (D.C. Cir. 2013) (refusing to consider arguments made by reference to those set forth in an interlocutory petition). Any other approach would allow litigants to circumvent the page limits for appellate briefs set out in Federal Rule of Appellate Procedure 32(a)(7).

Two of the company's arguments are properly before us: (1) that the Board did not consider the whole record when it made its credibility findings, and (2) that the Board applied an improper double standard to the evidence. Both are meritless.

First, we will not overturn an ALJ's credibility findings "absent the most extraordinary circumstances." *U-Haul Co. of Nev. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007). Instead, when the Board approves the credibility determinations of an ALJ, we "must uphold" those findings unless they are "hopelessly incredible," "self-contradictory," or "patently insupportable." *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998). Here, the ALJ extensively explained his decision to credit the employees' testimony. UNF West attacks those findings because Popovich testified more clearly than Edgar did about the eavesdropping incident. But that incident was a collateral issue. Although the eavesdropping may have led Cusey to question Edgar, it was the questioning, not the eavesdropping, that was the labor violation at issue. There is also no basis in the record to find Edgar's testimony hopelessly incredible, self-contradictory, or patently insupportable.

Similarly, UNF West argues that the ALJ erred by not articulating reasons for rejecting Popovich's testimony and the testimony of another witness about collateral issues when he accepted Edgar's and Sergio's version of events. But the ALJ implicitly rejected that testimony by expressly adopting the employees' statements, which contradicted those made by Popovich and the other witness. *See Am. Coal Co.*, 337 N.L.R.B. 1044, 1044 n.2 (2002) (citing *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1330 (7th Cir. 1978)); *see also Loral Def. Sys.-Akron v. NLRB*, 200 F.3d 436, 453 (6th Cir. 1999) (recognizing that an ALJ's failure to discuss specific pieces of one side's testimony when he expressly credits the other side does not mean the ALJ "failed to consider" the evidence). Furthermore, we have upheld an ALJ's decision to credit one side despite "minor contradictions in the testimony of the employees upon matters other than the relevant question—that is, whether [the employer] made the anti-union statements." *Capital Cleaning*, 147 F.3d at 1006. We see no reason to take a different tack here.

Second, the Board did not apply a double standard to the evidence. UNF West argues that, because the ALJ drew an adverse inference from UNF West's failure to call Cusey to testify,

the ALJ also should have penalized the General Counsel for the absence of other witnesses—specifically the employees who were with Edgar when Popovich eavesdropped and other employees whom Sergio told about the labor violation. But these are not similar witnesses. As the ALJ noted, Cusey was a “primary witness”: he *made* the illegal statements at issue. The other employees were not even witnesses to a charged violation. It was therefore reasonable for the ALJ to treat the two situations differently.

Relatedly, UNF West contends that because the ALJ discredited Oliver for hesitating to admit he believed unionization was unnecessary, the ALJ should have discredited Edgar for being evasive about his termination and attempt to keep the unionization effort a secret. But again, there were good reasons to treat the two situations differently. Here, Oliver’s beliefs about unionization were directly relevant to the alleged labor violations because, as the ALJ properly found, Oliver’s illegal conduct was “consistent with” his “strongly held belief” that the employees did not need to unionize. *UNF West, Inc.*, 361 N.L.R.B. No. 42 (2014). Consequently, Oliver’s evasion was relevant to the ALJ’s credibility determination. In contrast, Edgar was evasive on peripheral issues. In any case, the ALJ did not rely only on Oliver’s evasion when discrediting his testimony. Instead, the ALJ reasoned that he had “almost no confidence in the truthfulness of Oliver’s pat answer denying the incidents at issue,” which Oliver repeated when refuting assertions by another pro-union employee. *Id.* The ALJ acted well within his discretion in resolving the credibility of these conflicting witnesses. *See Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005).

Because UNF West offers no basis to overturn the Board’s findings, we deny the petition for review and grant the Board’s cross-application for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk